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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-17a) is reported at 94 F.3d 1519. The judgment of the district court (Pet. App. 20a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1996, and a timely suggestion of rehearing *en banc* was denied on January 6, 1997. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on February 12, 1997, and granted on May 27, 1997. 117 S. Ct. 1841. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." The Sixth Amendment to the United States

Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law."

STATEMENT

In this case, the trial court erroneously failed to instruct the jury on an essential element (*mens rea*) of the criminal offenses with which petitioner was charged. The Eleventh Circuit acknowledged that the trial court's instructional error was of "constitutional dimension" (Pet. App. 10a), but nonetheless affirmed petitioner's convictions on the ground that the error was "harmless" — even though the jury did not find the omitted element, or the predicate facts necessary to establish that element, beyond a reasonable doubt. The court of appeals reasoned that harmless-error review was appropriate because the instructional omission involved "only one element of the crime" and because the jury "made a constitutionally valid determination of guilt on all issues save one." Pet. App. 12a n.12. Thus, the court of appeals held, "there is a legitimate, though admittedly inchoate, adjudication of guilt upon which * * * harmless error analysis can operate." *Ibid.* Having made this threshold determination, the Eleventh Circuit concluded that the trial court's instructional error in fact was harmless because it "related to an element of the crime that the defendant in any case admitted," and because the court of appeals was "certain that the verdict in this case would have been the same absent the defective instruction." *Id.* at 16a, 17a.

A. Factual Background.

During the early morning of March 15, 1991, petitioner George Rogers was pulled over by a Broward County Deputy Sheriff on suspicion of driving while intoxicated, and was arrested after failing a field sobriety test. J.A. 5, 19-20.[1] In the course of a post-arrest search, the arresting officer found a .22 caliber handgun and magazine of .380 caliber ammunition in petitioner's pocket. The officer also found a .380 caliber handgun and ammunition in the front seat of petitioner's truck. In addition, behind the bench seat of the truck, the officer found a closed black bag containing a MAC-11 pistol, an unserialized silencer and other items. J.A. 62-63. The bag was not visible from the driver's seat. J.A. 63.

During a post-arrest interview (taped at petitioner's request), which was conducted at approximately 3:15 a.m., three hours after the arrest, petitioner candidly admitted possessing the .22 and .380 caliber handguns and ammunition. J.A. 29-30, 33-34. He firmly denied, however, ever possessing any of the items in the black bag, including the MAC-11 pistol and silencer, or even knowing of their existence prior to his interview. Pet. App. 3a; J.A. 30-31, 33, 51. The interviewing ATF agents nonetheless showed petitioner the items from the black bag and asked him: "[D]o you know what these are?" Petitioner responded that he could identify what the items were, including the silencer, as a result of his training with the Special Forces during the Vietnam War, but again denied any knowledge that the items had been in his truck. J.A. 33-34. A search of the National Firearms Registration and Transfer

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[1] Petitioner was tried in a state court on the offenses for which he was arrested, including driving while intoxicated and carrying a concealed weapon. He was acquitted by the jury of all charges. J.A. 22-23, 61.

Record revealed that no firearms had been registered to petitioner. Pet. App. 2a-3a.

B. Proceedings In The District Court.

1. Petitioner was charged with possession of an unregistered and unserialized silencer in violation of 18 U.S.C. §§ 5861(d) and 5861(i).[2] At trial, petitioner defended solely on the ground that he never knowingly possessed the silencer in question, and that after his experience with silencers as a member of the Fifth Special Forces Group in Vietnam, he never would knowingly possess a silencer. J.A. 32-34, 46, 64-65. Petitioner took the stand and admitted possessing the .22 and .380 caliber handguns and ammunition (J.A. 63-64), explaining that he was an avid marksman who regularly participated in riflery competitions. J.A. 64-66. Petitioner also testified that his military training enabled him to identify the item in question as a silencer. J.A. 69-70, 74-75. He consistently denied, however, ever owning or possessing any silencer since his return from the war. J.A. 65, 70, 74-75. When asked how the silencer in question got into his truck, petitioner testified: "My hand to God, I do not know what happened. I do not know how that got in my truck and I do not know what happened. I only know that it is not mine." J.A. 75-76.

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[2] Petitioner also was charged with possession of an unregistered automatic machine gun (the MAC-11 pistol) in violation of 18 U.S.C. § 922(o). However, at trial the government offered no evidence that petitioner was aware the pistol had been converted to an automatic weapon. On appeal, the government conceded that, under *Staples* v. *United States*, 511 U.S. 600, 609 (1994), petitioner's conviction for possession of the pistol should be vacated because "the government did not submit sufficient proof to the jury that appellant knew the MAC-11 had been converted from semi-automatic to fully-automatic status." U.S. C.A. Br. 5. The court of appeals agreed, holding that the "conviction on this count cannot stand" under *Staples*. Pet. App. 8a.

At trial, petitioner requested that the jury be instructed that it could find him guilty of the offenses charged only if the government proved beyond a reasonable doubt that "the defendant willfully and consciously possessed items which he knew to be 'firearms'" under the law. J.A. 12. In offering this instruction, petitioner's counsel stated that "[i]t is the law, I believe, and it is also our defense which has been made fairly clear at this point." J.A. 54. The district court denied the requested instruction. J.A. 87. Instead, the court instructed the jury that for each offense the government had to prove petitioner "knowingly possessed" the firearm in question, but specifically directed the jury that it was *not* required to find that petitioner was aware of the characteristics of the item that made it a registerable "firearm" under federal law:

> It is not necessary for the Government to prove that the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered.* * * What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that i[t] was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

J.A. 104. Petitioner's timely objection to this instruction was overruled. J.A. 84-87. The jury convicted petitioner on each count. J.A. 108-109.

3. After the jury rendered its verdict, the district court noted on the record that "this was an extremely sympathetic jury. One man told me after wiping away tears, that the jury all had a lot of compassion for the defendant and it was a difficult decision for them. There were a number of jurors in there, frankly, wiping away tears. I don't often see that. Obviously [it] was a close question for them * * *." J.A. 109. The court also noted at petitioner's sentencing hearing that "[i]t

is only about every five years or so you get a defendant takes the stand and testifies the way Mr. Rogers does, straight up, clear-cut, flat-out, no fudging or hedging, and it's always refreshing. I know the jury had trouble with their deliberations." J.A. 109. The court sentenced petitioner to time served and three years of supervised release, due in part to its finding that petitioner was "extremely distraught over his conviction and accompanying loss of civil rights." J.A. 110.

C. Proceedings In The Court of Appeals.

On May 23, 1994, six weeks after the jury verdict, this Court announced its decision in *Staples* v. *United States*, 511 U.S. 600, 609 (1994), holding that the government must prove, as an essential element of the firearms offenses involved here, that the defendant knew "the particular characteristics that make his weapon a statutory firearm." Relying on *Staples*, petitioner appealed to the Eleventh Circuit, arguing that the district court committed reversible error when it withdrew from the jury an essential element of the offenses charged. In response, the government conceded that the trial court's instruction on the silencer charge did "not pass post-*Staples* muster insofar as it explicitly withdrew from the jury's consideration the issue of appellant's knowledge that the 'firearm' he possessed fell within the statutory definition." U.S. C.A. Br. 10. It argued nonetheless that the instructional omission was "harmless" under *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam), because "the evidence that appellant knew the nature of the silencer was unchallenged and unassailable." *Id.* at 10-11, 13.

The Eleventh Circuit affirmed. It acknowledged that "[w]ith the benefit of the Supreme Court's opinion in *Staples*, we can now indubitably state that the district court's action effectively omitted from the instructions an essential element of the crime charged under § 5861(d)." Pet. App. 8a. The court also recognized that "the district court committed an error of

constitutional dimension when it declined to instruct the jury on an essential element of the crime." *Id.* at 10a. The only remaining issue before the court, then, was the "quite daunting task" of determining whether the error in question was amenable to harmless-error review. The court held that it was, and found the error harmless.

The court first held that the trial court's failure to instruct the jury on the essential *mens rea* element was amenable to harmless-error scrutiny on the ground that, under *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991), the error was not a "structural defect[]" which "'def[ies] analysis by "harmless error" standards.'" Rather, the court "liken[ed] the error * * * to other 'trial errors which occur 'during the presentation of the case to the jury, and which may therefore be qualitatively assessed in the context of other evidence presented."'" Pet. App. 12a (quoting *Fulminante*, 499 U.S. at 309; *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993)).

In so holding, the Eleventh Circuit expressly disagreed with the Fifth Circuit's decision in *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (1996), that instructional omissions necessarily require reversal under *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). The court distinguished the instructional omission before it from the defective reasonable doubt instruction in *Sullivan*:

> With respect, we feel that *Pettigrew* reads too broadly the basic holding of *Sullivan*. Unlike a flawed reasonable doubt instruction, which completely negates every jury finding, *the typical instructional omission will affect only one element of the crime. Thus, as in this case, the jury will have made a constitutionally valid determination of guilt on all issues save one.* Consequently, contrary to *Sullivan*, there is a legitimate, though admittedly

> inchoate, adjudication of guilt upon which, under appropriate circumstances, harmless error analysis can operate.

Pet. App. 13a n.12 (emphasis added).

While the court of appeals "wholeheartedly accept[ed]" the notion "that it cannot be harmless when the trial court directs a verdict [in favor of the prosecution] on an element of the crime charged," (Pet. App. 15a n.13), it disagreed that an instructional omission on an essential element is tantamount to such a directed verdict because "[i]n contrast to a directed verdict, the failure to instruct on a particular element does not completely prohibit the jury from considering evidence relevant to that issue." *Ibid.*

Having found that the trial court's instructional omission was susceptible to harmless-error review, the Eleventh Circuit went on to determine whether the error was, in fact, harmless. Purporting to follow Justice Scalia's concurring opinion in *Carella* v. *California*, 491 U.S. 263, 270 (1989) (per curiam), the court of appeals stated that an instructional omission on an essential element

> may be viewed as harmless only in three rather infrequent scenarios: 1) Where the infirm instruction pertained to a charge for which the defendant was acquitted (and not affecting other charges); 2) Where the omission related to an element of the crime that the defendant in any case admitted; and 3) Where the jury has necessarily found certain other predicate facts that are so closely related to the omitted element that no rational jury could find those facts without also finding the element.

Pet. App. 14a-15a. The court of appeals determined that the district court's failure to instruct the jury on the *mens rea* element was harmless under the second of these "exceptions" because, in the court's view, petitioner had effectively "admitted" *mens rea* by his identification of the item in question as a silencer during his post-arrest interview and at trial:

> In his post arrest interview, which was reproduced for the jury via videotape, and again on the witness stand at trial, Rogers emphatically and without reservation admitted that he knew the item found in his truck was a silencer. * * * These unequivocal assertions convince us that this is a case in which the instructional omission related to an element of the crime that the defendant in any case admitted.

Pet. App. 16a. The court of appeals then concluded "that the constitutional error was harmless beyond a reasonable doubt, as we are certain that the verdict in this case would have been the same absent the defective instruction." *Id.* at 17a.

SUMMARY OF ARGUMENT

At issue in this case is whether it can ever be harmless error under the Constitution for a person to be convicted of an offense by a jury that has not found him guilty beyond a reasonable doubt of each and every element of that offense. The Eleventh Circuit answered this question in the affirmative, holding that the failure of the trial court to instruct the jury on an essential element of the offenses charged was subject to harmless-error review because the error involved "only one element" (Pet App. 13a n.12), and because the court viewed the element as one that petitioner had "in any case admitted." *Id.* at 16a. The court proceeded to "fill the gaps" in the jury's verdict and supplied the missing factual findings that the jury never made based on the court's "certain[ty]" that the jury's verdict would have been the same had it been properly instructed. Pet App. 17a. As we demonstrate below, the court

of appeals' decision reflects a profound disregard of the right to trial by jury and a patent misapplication of this Court's harmless-error decisions, which clearly confirm that harmless-error review is inapplicable where the jury has not rendered a verdict on every element of the offense charged.

I. Under *Chapman* v. *California*, 386 U.S. 18 (1967), and its progeny, the constitutional harmless-error doctrine applies only where the jury has actually rendered a complete verdict on every element of the offense, and only then to gauge whether the constitutional error contributed to the verdict actually entered. In this case, however, the court of appeals unhinged the harmless-error doctrine, using it to actually *supply* factual findings that the jury never made concerning an element that the district court explicitly removed from the jury's consideration. Such misuse of the harmless-error doctrine cannot be reconciled with the Court's unanimous decision in *Sullivan* v. *Louisiana*, 508 U.S. 275, 280 (1993), which squarely held that where a jury does not enter a complete verdict based on the instructions actually given, "the entire premise of *Chapman* review is simply absent" since "the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which the harmless-error scrutiny can operate." In this case, the court of appeals did precisely what *Sullivan* held it could not do.

II. The court of appeals tried to justify its application of the harmless-error doctrine by noting that the element in question (*mens rea*) was one that petitioner had "admitted" through statements made during a post-arrest interview and again at trial. The court of appeals searched the record for "admissions" even though the Court's "harmless-error cases do not turn on whether the defendant conceded the factual issue on which the error bore." *Rose* v. *Clark*, 478 U.S. 570, 583

(1986). Indeed, where an essential element has been completely removed from the jury's consideration, the fact that a defendant has provided evidence relevant to that element is constitutionally meaningless, since a defendant has the unqualified right to insist upon a jury determination of guilt, and because "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *Estelle* v. *McGuire*, 502 U.S. 62, 69 (1991). In this case, while petitioner made admissions relevant to the element removed by the trial court, it was still the jury's exclusive province to decide the weight of those admissions and to determine whether the prosecution proved the omitted element beyond a reasonable doubt. Under *Sullivan*, a defendant's testimonial admissions in no way justify application of harmless-error review where an essential element is omitted from the jury instructions. For even in such a case, the fact remains that "[t]he most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough." *Sullivan*, 508 U.S. at 280.

III. The court of appeals also took comfort in the fact that its intrusion into the province of the jury involved only one element of the offenses charged, and that the jury had otherwise "made a constitutionally valid determination of guilt on all issues save one." Pet. App. 13a n.12. The assumption that the Constitution will tolerate a jury verdict on all elements except one, however, is plainly wrong. The Constitution guarantees "a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of *every element* of the crime with which he is charged." *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995) (emphasis added). By holding that the Constitution permits the harmless-error doctrine to be used to

"fill in the gaps" left open by a trial court's failure to instruct on an element of the offense, the court of appeals plainly exceeded the boundaries set by this Court in *Sullivan*.

ARGUMENT

I. FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT OF A CRIMINAL OFFENSE CANNOT BE DEEMED "HARMLESS ERROR" WHERE THE JURY HAS NOT FOUND THE OMITTED ELEMENT BEYOND A REASONABLE DOUBT.

"The right to have a jury make the ultimate determination of guilt has an impressive pedigree." *United States* v. *Gaudin*, 115 S. Ct. 2310, 2313 (1995) (citing 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769); 2 J. Story, *Commentaries on the Constitution of the United States* 541 n.2 (4th ed. 1873)). "It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689." *Duncan* v. *Louisiana*, 391 U.S. 145, 151 (1968). The right to a jury trial, in fact, is the only right proclaimed in each of the twelve state constitutions in existence prior to the Constitutional Convention and is the only guarantee to appear in both the Constitution and the Bill of Rights. A.W. Alschuler & A.G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994).

A criminal defendant's right to trial by jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993).

The right is all-encompassing, "giv[ing] a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of *every element* of the crime with which he is charged." *Gaudin*, 115 S. Ct. at 2320 (emphasis added). As this Court held in *In re Winship*, 397 U.S. 358 (1970), "'[n]o man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them * * * is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged'." *Id.* at 363 (quoting *Davis* v. *United States*, 160 U.S. 469, 493 (1895)). Accordingly, "a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." *Cabana* v. *Bullock*, 474 U.S. 376, 384 (1986).

In this case, the court of appeals acknowledged these bedrock constitutional principles and agreed that petitioner's constitutional right to a jury determination of guilt or innocence was violated by the trial court's failure to instruct the jury on an essential element of the offenses charged. The court nonetheless held that this constitutional violation was subject to harmless-error analysis because it affected "only one element of the crime," and because the jury had "made a constitutionally valid determination of guilt on all issues save one." Pet. App. 13a n.12. This holding misapplies this Court's harmless-error decisions, which never have countenanced a "single element" exception to the right to trial by jury. To the contrary, the Court consistently has emphasized that the harmless-error doctrine may not be used by reviewing courts to decide factual issues that the jury never considered, to supply findings of guilt that the jury never made, or to resuscitate an incomplete or fatally defective verdict.

In sum, by declaring the trial court's removal of an essential element from the jury was subject to harmless-error

review (and finding that the error was actually harmless), the court of appeals violated petitioner's constitutional right to a jury verdict on that element. It also misapplied *Chapman* v. *California*, 386 U.S. 18 (1967), and its progeny. Under the *Chapman* standard, where (as here) the jury has not rendered a complete verdict on every element of the offenses charged, the harmless-error doctrine has no application at all. The court of appeals' decision to apply that doctrine here must therefore be reversed.

A. The Harmless-Error Doctrine Cannot Be Used To Supply Factual Findings On Elements That The Jury Never Considered.

1. From its first articulation in *Chapman* v. *California*, 386 U.S. 18 (1967), the constitutional harmless-error doctrine has been carefully limited to those cases in which an otherwise valid conviction has been entered, and then only to avoid "reversal of the conviction if the State could show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Sullivan*, 508 U.S. at 279 (quoting *Chapman*, 386 U.S. at 24). See also *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). As *Chapman* explained, whenever a claim of harmless error is made, the court must address two distinct questions: "(1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?" 386 U.S. at 20. If the appellate court answers the first question in the negative, the error is one that cannot be harmless under the Constitution, rendering the second question unnecessary and ending the harmless-error inquiry. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

Under the principles recently expressed in *Sullivan*, the constitutional error in this case is one that cannot be declared harmless. As the Court explained, "[h]armless-error review looks * * * to the basis on which 'the jury actually rested its

verdict.'" 508 U.S. at 279 (quoting *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991)).[3] By focusing solely on the verdict actually entered by the jury,

> the question [*Chapman*] instructs the reviewing court to consider is *not* what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. * * * The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict *actually rendered* in this trial was surely unattributable to the error.

Ibid. (emphasis added). It follows, then, that the harmless-error doctrine applies *only* where the jury has "actually entered" a complete guilty verdict; it is *not* a license for appellate courts to supply a verdict, or a portion thereof, that the jury never entered. As *Sullivan* put it, for an appellate court "to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee." *Ibid.*[4]

Applying these principles, *Sullivan* declared that the harmless-error doctrine has no role to play when the jury has not found every essential element of the offense charged beyond

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[3] Accord R. Traynor, *The Riddle of Harmless Error* 21 (1970) ("It is one thing for an appellate court to determine that a verdict was or was not affected by error. It is quite another for an appellate court to become in effect a second jury to determine whether the defendant is guilty").

[4] Thus, as the Court recently pointed out in *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997), where an essential element has been removed from the jury's consideration, *Sullivan* is "the case most closely on point."

a reasonable doubt — which occurred in *Sullivan* because the reasonable doubt instruction given there was constitutionally defective. In such a case, there is nothing that a reviewing court can constitutionally do that would allow it to declare such an error harmless because there never was a constitutional "verdict" in the first place:

> Since * * * there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which the harmless-error scrutiny can operate.

Sullivan, 508 U.S. at 280 (citing *Yates*, 500 U.S. at 413-414 (Scalia, J., concurring); *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946)).

The foregoing principles compel the same result in this case. Here, the jury found petitioner guilty without finding an essential element of the crimes charged. The constitution, however, "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Gaudin*, 115 S. Ct. at 2313. Without such a determination by the jury, as was the case in *Sullivan*, "there has been no jury verdict within the meaning of the Sixth Amendment." 508 U.S. at 280.

As the court of appeals' decision below highlights, without a complete verdict by the jury on every element, the *only* way that an appellate court can purport to remedy the omission of an essential element is by weighing the record evidence itself and surmising what the jury would have decided had it considered

the omitted element. Thus, the court below reviewed petitioner's trial testimony and concluded that the trial court's "instructional omission related to an element of the crime that the defendant in any case admitted," and pronounced itself that it was "certain that the verdict in this case would have been the same absent the defective instruction." Pet. App. 16a-17a. Such appellate fact-finding is precisely what the Constitution forbids in criminal cases, for it is the jury's exclusive province to decide guilt or innocence on every element of the offense charged, "no matter how inescapable the findings to support that verdict might be." *Sullivan*, 508 U.S. at 279. In short, "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, * * * it requires an actual jury finding of guilty." *Id.* at 280. See also *Boyde* v. *California*, 494 U.S. 370, 379-380 (1990) (rejecting standard requiring examination of what a reasonable juror "could" have or "would" have done). No such finding was made by the jury below.

2. For an appellate court to declare the trial court's omission of an essential element of the offense harmless error based on its view of the evidence concerning that element is tantamount to affirming a directed verdict against the defendant on that element. The Constitution forbids such usurpation of the jury's function. See *Sullivan*, 508 U.S. at 280 ("[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal").

It is axiomatic that "although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan*, 508 U.S.

at 277.[5] The prohibition against directed verdicts of guilt "stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases." *Rose*, 478 U.S. at 578. Thus, in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), this Court reaffirmed the exclusive constitutional role of the jury as the finder of fact:

> In a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction.

Id. at 572-573 (citations omitted).

In this case, the district court's omission of an essential element had the same effect as a directed verdict in favor of the prosecution on that element. As Justice Powell explained, "[a] directed verdict removes an issue completely from the jury's consideration" and "permits a jury to convict a defendant 'without ever examining the evidence concerning an element of the crimes charged.'" *Connecticut* v. *Johnson*, 460 U.S. 73,

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[5] Accord, *e.g.*, *Sparf* v. *United States*, 156 U.S. 51, 105 (1895) ("it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged, or of any criminal offense less than that charged"); *id.* at 174 (Gray, J., dissenting) ("the court can never order the jury to convict, for no one can be found guilty but by the judgment of his peers"); *Connecticut* v. *Johnson*, 460 U.S. 73, 83 (1983) (plurality) ("The Court consistently has held that 'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict * * * regardless of how overwhelming the evidence may point in that direction'") (quoting *Martin Linen*).

95-96 (1983) (dissenting opinion). See also *Martin Linen*, 430 U.S. at 571 (a directed verdict, "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged"). That is precisely what occurred here. Indeed, the trial court explicitly *removed* the element of *mens rea* from the case by instructing the jury that it was *not* necessary for the prosecution to prove beyond a reasonable doubt that petitioner knew the characteristics of the item that made it a registerable "firearm." As with a directed verdict, then the omission of an essential element of the crimes charged permitted the jury to convict petitioner without ever examining the evidence to determine whether the omitted element was met.

Also, like a directed verdict, withdrawing an essential element from the jury's purview vitiates the jury's constitutional role as the finder of fact. As such, it is an error that necessarily defies measurement, and is incapable of harmless-error scrutiny. Indeed, this Court confirmed in *Rose* that

> harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. * * * This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. * * * Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

478 U.S. at 578 (citing *Martin Linen*, 430 U.S. at 572-73; *Carpenters & Joiners* v. *United States*, 330 U.S. 395, 408 (1947); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968)). See also *Arizona* v. *Fulminante*, 499 U.S. 279, 294 (1991) (White J., dissenting) (directed verdict for the State is among the

"constitutional errors that invalidate a conviction even though there may be no reasonable doubt that the defendant is guilty and would be convicted absent the trial error"); R. Traynor, *The Riddle of Harmless Error* 21 (1970) (same). It is for this very reason that removal of an essential element from the jury's consideration can never be regarded as harmless. To hold otherwise "would be to dispense with trial by jury." *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (Scalia, J., concurring).

Indeed, it is this very principle that underlies this Court's decision in *Carpenters & Joiners* v. *United States*, 330 U.S. 395 (1947). In *Carpenters*, the trial court failed to properly instruct the jury that the defendants could be found guilty of conspiracy to violate the antitrust laws only if the defendants actively participated in the conspiracy. This Court reversed the conviction, despite clear record evidence that the defendants had in fact participated in the alleged conspiracy, expressly refusing to weigh the evidence to determine whether the conspiracy element had been established:

> We do not enter into an analysis of the evidence that was relied upon to show the participation of the unions in the conspiracy. * * * No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under § 6 of such association or organization for acts of its agents. For a judge may not direct a verdict of guilty no matter how conclusive the evidence.

Id. at 408-409.

Where, as here, the jury has rendered an incomplete verdict and not found the defendant guilty of every element of the offense charged beyond a reasonable doubt, there also is no room for harmless-error scrutiny. Under the harmless-error

doctrine, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Carella*, 491 U.S. at 269 (Scalia, J., concurring) (quoting *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946)). See also *Weiler* v. *United States*, 323 U.S. 606, 611 (1945) ("We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility"). It makes no difference that a reviewing court may perceive the record evidence on an omitted element as "overwhelming," "because to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee." *Sullivan*, 508 U.S. at 279.[6] In short, to affirm a conviction where the jury did not

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[6] Accord, *e.g.*, *Connecticut* v. *Johnson*, 460 U.S. at 86 (plurality opinion) ("The fact that the reviewing court may view the evidence [on an element] as overwhelming is * * * simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence * * *, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made"); *United States* v. *Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring) ("A federal appellate court should not find harmless error merely because it believes that the other evidence is 'overwhelming'"); *Henderson* v. *Morgan*, 426 U.S. 637, 650 (1976) (White, J., concurring) ("[i]t should hardly need saying that a judgment of conviction cannot be entered against a defendant no matter how strong the evidence is against him, unless that evidence has been presented to a jury (or a judge, if a jury is waived) and unless the jury (or judge) finds from that evidence that the defendant's guilt has been proved beyond a reasonable doubt. It cannot be 'harmless error' wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged"); *Bollenbach*, 326 U.S. at 615 ("[i]n view of the place of

render a verdict on every element beyond a reasonable doubt would squarely violate the Due Process Clause, which "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364.

3. Although most errors that occur during the trial process will be amenable to harmless-error scrutiny, there are certain "structural" errors that so fundamentally impair the right to a fair trial that they "defy analysis by 'harmless-error' standards," *Fulminante*, 499 U.S. at 307-309, and thus "require reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577. A conviction rendered without a verdict of guilty beyond a reasonable doubt on every element of the offense charged is among those errors.

In *Fulminante*, this Court "distinguished between, on the one hand, 'structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards,' and, on the other hand, trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented.'" *Sullivan*, 508 U.S. at 281 (quoting *Fulminante*, 499 U.S. at 307-09). An incomplete jury verdict is not attributable to the presentation of evidence. And like other errors that this Court has regarded as structural, there is nothing that a reviewing court can look to that would allow it to declare the error harmless. "The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty

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importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be").

beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough." *Sullivan*, 508 U.S. at 280. Accord *Cabana* v. *Bullock*, 474 U.S. 376, 384-385 (1986) ("Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime").

As noted above, *Sullivan* held that a defective reasonable-doubt instruction could not be reviewed for harmless error because the instructional error produced an incomplete verdict that fundamentally deprived the defendant of his right to a jury determination of guilt or innocence on every element of the offense beyond a reasonable doubt:

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the [structural] sort, the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. * * * The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

508 U.S. at 281-282 (quoting *Rose*, 478 U.S. at 577; *Duncan*, 391 U.S. at 155). Accord *Duncan*, 391 U.S. at 149 ("trial by jury in criminal cases is fundamental to the American scheme of justice"); *Carella* v. *California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (the right to a jury determination of guilt "is a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges'") (quoting *Duncan*, 391 U.S. at 156).

Just like the defective reasonable doubt instruction in *Sullivan*, the trial court's explicit removal of *mens rea* from the jury's consideration below produced a constitutionally incomplete verdict. When such an error occurs, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence * * * and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577-578. If anything, the error committed below was even *more* "structural" than that in *Sullivan*, which "neither * * * removed an element of the offense from the jury's consideration [n]or prevented the jury from considering certain evidence." *Sullivan*, 508 U.S. at 283 (Rehnquist, C.J., concurring). Here, by contrast, that is precisely what occurred.[7]

In short, *Sullivan* compels the conclusion that a trial court's omission of an essential element is a structural error because, in such a circumstance, "[a] reviewing court can only engage in pure speculation — its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Sullivan*, 508 U.S. at 281 (quoting *Rose*, 478 U.S. at 578).[8] Accord *Carella*, 491 U.S. at

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[7] See G. Chernack, Note, *Silence Cannot Be Harmless: United States* v. *Rogers*, 106 YALE L.J. 2305, 2309 (1997) ("In *Sullivan*, the jury had considered all the issues but simply had not applied the proper standard; in *Rogers*, the jury failed to consider a necessary element of the offense. It is difficult to imagine why harmless-error review should be applied in the latter situation when such review is inappropriate in the former. By completely undermining the promise of trial by jury, an omitted instruction should lead to automatic reversal").

[8] See also J. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. REV. 819, 850 (1994) ("The very same logic in [*Sullivan*] compels the conclusion that a deprivation of the rights to have the jury make all elemental determinations and to consider all admitted, elementally relevant evidence — rights as much a part of the Sixth

269 (Scalia, J., concurring) (where essential factual issue is omitted, "the problem would not be cured by an appellate court's determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, 'the error in such a case is that the wrong entity judged the defendant guilty'") (quoting *Rose*, 478 U.S. at 578)). The omission of an element from the jury instructions does not, in and of itself, constitute "structural error." Rather, it is the absence of an actual jury verdict on each essential element of the offense that "unquestionably qualifies as 'structural error.'" *Sullivan*, 508 U.S. at 281-282.

The court of appeals held that the error below was not structural, and distinguished the omission of an essential element from the defective reasonable doubt instruction in *Sullivan* on the ground that the jury in petitioner's case made a valid determination of guilt on all elements "save one":

> Unlike a flawed reasonable doubt instruction, which completely negates every jury finding, the typical instructional omission will affect only one element of the crime. *Thus, as in this case, the jury will have made a constitutionally valid determination of guilt on all issues save one.* Consequently, contrary to *Sullivan*, there is a legitimate, though admittedly inchoate, adjudication of guilt upon which, under appropriate circumstances, harmless error analysis can operate.

Pet. App. 13a n.12 (emphasis added). In other words, according to the court of appeals, the constitutional right to a

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Amendment's jury-trial guarantee as the right to a jury verdict of guilty beyond a reasonable doubt — constitutes structural error").

jury determination of guilt or innocence is satisfied so long as the jury considers *most* of the elements in question "save one."

This is patently wrong. It is not sufficient under the Constitution for a jury's verdict to be "close enough" or "almost complete." *Cf. Sullivan*, 508 U.S. at 278 ("[i]t would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt"). As Justice Scalia recently observed, "[a] jury verdict that [the defendant] is guilty of the crime means, of course, a verdict that he is guilty of *each necessary element* of the crime." *California* v. *Roy*, 117 S. Ct. 337, 338 (1996) (concurring opinion) (emphasis added). A "verdict" rendered on all but one element of the offense charged is simply not a verdict recognized by the Fifth or Sixth Amendments. It is as incomplete and defective as a verdict rendered on all elements, but under the wrong burden of proof.

It necessarily follows that where an essential element is entirely removed from the jury's consideration, the error is structural, and that the harmless-error doctrine simply has no role to play. "When a court is asked to hold that an error that occurred did not interfere with the jury's ability to legitimately reach the verdict that it reached, harmless-error analysis may often be appropriate. But this principle cannot apply unless the jury found all of the elements required to support a conviction. The harmless-error doctrine may enable a court to remove a taint from proceedings in order to preserve a jury's findings, but it cannot constitutionally supplement those findings." *Pope* v. *Illinois*, 481 U.S. 497, 509-510 (1987) (Stevens, J., dissenting) (cited with approval in *Sullivan*, 508 U.S. at 280) (citations omitted). To be sure, "[i]t cannot be 'harmless error' wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged." *Henderson* v. *Morgan*, 426 U.S. 637, 650 (1976) (White, J., concurring).

B. The Inapplicability Of Harmless-Error Review When The Jury Has Not Found Every Element Of The Offense Charged Is Fully Consistent With This Court's Other Instructional Error Decisions.

1. In confronting the question of whether, and to what extent, instructional errors are amenable to harmless-error scrutiny, the Court consistently has adhered to the fundamental principle that an appellate court may not serve as the finder of fact. In *Carpenters*, for instance, the trial court misdescribed an element by failing to properly charge the jury that a labor union could only be convicted of an antitrust conspiracy only if the union actively participated in the unlawful acts in question. Because the trial court's misdescription completely foreclosed the jury's consideration of whether the defendants had actively participated in the conspiracy, the Court refused to analyze or weigh the record evidence of active participation, notwithstanding its apparent strength. 330 U.S. at 408-09. See also *supra* at 20.

In contrast to the circumstances presented in *Carpenters*, it is possible that a jury, while misinstructed on an element, may nonetheless find the facts necessary to establish the proper element beyond a reasonable doubt. For instance, in *Pope* v. *Illinois*, 481 U.S. 497 (1987), the jury was instructed that it should base its determination of whether the materials at issue were obscene upon how ordinary adults in the State of Illinois would view the material. The Court ruled that this instruction was flawed under the First Amendment, because obscenity should be judged not from the perspective of "an ordinary member of any given community," but rather from that of "a reasonable person." *Id.* at 500-501. The Court remanded the case to the state appellate court to determine whether the error was harmless. *Id.* at 504.

Although finding that the erroneous jury instructions were subject to harmless-error scrutiny, *Pope* is fully consistent with

the basic principle, reflected in *Carpenters*, that an appellate court may not supply a factual finding that the jury never made. As the Court explained, when determining whether to engage in harmless-error review, an appellate court in a misdescription case must determine whether "the facts that the jury necessarily found established guilt beyond a reasonable doubt." 481 U.S. at 503. What distinguished *Pope* from *Carpenters*, then, was that "the jurors [in *Pope*] were not precluded from considering" any element of the offense charged. *Ibid.* As Justice Scalia later explained, the error in *Pope* was subject to harmless-error review because "no rational juror could plausibly have found the magazines utterly lacking in value under a community standard and come to a different conclusion under a reasonable person standard." *Carella*, 491 U.S. at 271 (concurring opinion). Thus, the appellate court in *Pope* validly could conclude that the jury actually found the required element notwithstanding its misdescription in the jury instructions.

Read in tandem, *Carpenters* and *Pope* demonstrate that, at least analytically, the wholesale omission of an element is "as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission.'" *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (per curiam). See also *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997) (same). Omissions and misdescriptions each can "deprive[] the jury of its factfinding role" and thus will "circumscribe the availability of harmless-error analysis." *Carella*, 491 U.S. at 269, 270 (Scalia, J., concurring). But in either event, the instructional error can be subject to harmless-error scrutiny *only* where the predicate facts found by the jury under the instructions actually given "are so closely related" to the element omitted by the trial court "that no rational jury could find those facts without also finding" the facts necessary to establish the omitted element beyond a reasonable doubt, such that "making those findings is functionally equivalent to

finding the [omitted] element." *Sullivan*, 508 U.S. at 281. As Justice Scalia explained, instructional errors concerning a particular element "can be harmless only if the jury verdict on other points effectively embraces [the element] or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well." *Roy*, 117 S. Ct. at 339-340 (concurring opinion). "The error is harmless in this situation because it is beyond a reasonable doubt that the jury found the facts necessary to support the conviction." *Yates* v. *Evatt*, 500 U.S. 391, 406 n.10 (1991). On the other hand, where the erroneous instructions allow the jury to convict *without* finding "the facts necessary to support the conviction," the error is not subject to harmless-error scrutiny.

2. While analytically similar, instructional errors involving omissions, misdescriptions and presumptions will likely differ in the frequency with which they are amenable to harmless-error review — that is, in the frequency with which it can be determined that the jury actually found the element despite the error. Logically, it will be far more unlikely in the case of an omission that the jury's verdict on other elements necessarily embraced the omitted element since, by definition, the jury will have received *no* direction as to that element.

Erroneous presumptions are different. "Because a presumption does not remove [an element] from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Rose*, 478 U.S. at 580 n.8 (quoting *Connecticut* v. *Johnson*, 460 U.S. at 95 n.3 (Powell, J., dissenting)). "When a jury is instructed to presume [an element] from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." *Id.* at 580. In other words, the record may show that the erroneous presumption was unimportant in relation to everything else the jury considered on the issue in question, such that "[a] reviewing court may thus be able to conclude that the

presumption played no significant role in the finding of guilt beyond a reasonable doubt." *Sullivan*, 508 U.S. at 281 (citing *Yates*, 500 U.S. at 402-406).[9] Likewise, in the case of a simple misdescription (as in *Pope*), the erroneous instruction may be simply "superfluous" to the extent that "the predicate facts conclusively establish" the ultimate fact. See *Rose*, 478 U.S. at 580-581.

In contrast to an erroneous presumption (and many misdescriptions), however, complete omission of an element likely will deprive the jury of an opportunity to find the essential element required for conviction. As a result, it is improbable that a reviewing court will be able to determine that the jury actually found the proper element despite the instructional error — particularly where, as here, the trial court explicitly directed the jury *not* to consider that element. See G. Chernack, Note, *Silence Cannot Be Harmless: United States v. Rogers*, 106 YALE L.J. 2305, 2307 (1997) ("[e]mploying harmless error analysis when an instruction is omitted makes it impossible to determine whether a jury has found the existence of 'every fact necessary' and, even if it has, whether it has done so beyond a reasonable doubt").

The court of appeals was flatly wrong to conclude that "the failure to instruct on a particular element" in this case "[did] not completely prohibit the jury from considering evidence relevant to that issue." Pet. App. 15a & n.13. The trial court explicitly took the *mens rea* element away from the

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[9] This is why a defendant's "admission" of an element can render harmless an erroneous presumption. After hearing an unequivocal in-court admission, a jury would have no need to resort to the presumption. The compelling evidence going directly to the ultimate issue, as to which the jury has been correctly instructed, "sufficiently reduc[es] the likelihood that the jury applied the erroneous instruction" at all. *Connecticut* v. *Johnson*, 460 U.S. at 87.

jury, instructing the jury that "[i]t is not necessary for the Government to prove" that element. J.A. 104. There simply was "nothing in the instruction [that] would have directed the jury, or even permitted it, to consider and apply [the evidence pertaining to that element] in reaching its verdict." *Carella*, 491 U.S. at 269 (Scalia, J., concurring). And to indulge the fiction that the jury, contrary to the trial court's instructions, nevertheless considered the omitted element "would be factually untenable * * * and would run counter to a sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given." *Yates*, 500 U.S. at 403.[10]

Unlike the case of a flawed presumption, the presence of "overwhelming" evidence cannot mitigate a failure to instruct on an essential element, since no amount of evidence can show that the jury actually found what it was never directed to find (or, in this case, was told *not* to find). See *Carella*, 491 U.S. at 270 (Scalia, J., concurring) ("misdescription of an element of the offense has * * * been held not curable by overwhelming record evidence of guilt") (citing *Carpenters*, 330 U.S. at 408-409). Thus, when faced with an omission in the jury instructions, a reviewing court can find that a jury found the facts establishing the omitted element only if the jury instructions *actually given* necessarily embraced the missing element. As Justice Scalia has explained, *Pope* was such a case because the jury could not have found a magazine obscene

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[10] See also Chernack, *supra*, 107 YALE L.J. at 2308 (where element is omitted from the jury instructions, "a court cannot ask what evidence the jury considered on a particular issue because the omitted instruction has made the issue irrelevant to the determination of guilt. By allowing harmless error review to take place in such cases, the court substitutes its own view for that of the jury on an issue that the jury has not even considered. Such a result directly conflicts with a fundamental longstanding constitutional protection: the prohibition on directed guilty verdicts").

under a "community" standard without also finding it obscene under a "reasonable person" standard. *Carella*, 491 U.S. at 271. In *Carpenters*, by contrast, a finding of guilt in accordance with the jury charge did not require the jury to find that the defendants actively engaged in a conspiracy beyond a reasonable doubt. *Carpenters*, 330 U.S. at 407 & n.19. Notwithstanding the apparent strength of the evidence, nothing the jury was asked to consider in *Carpenters* required it to make the requisite finding. *Id.* at 408.

In short, the focus in each of this Court's instructional error cases always has been on what the jury actually found — not on what the jury hypothetically would have found had it been instructed correctly. See *Sullivan*, 508 U.S. at 279-280. In this case, it is undisputed that the jury *never* found that petitioner possessed the *mens rea* required to prove that he committed the charged crimes. In *Staples* v. *United States*, 511 U.S. 600, 609 (1994), this Court held that the government must prove, as an essential element of a firearms offense under 18 U.S.C. § 5861(d), that the defendant knew "the particular characteristics that make his weapon a statutory firearm."[11] Here the trial court expressly instructed the jury that the prosecution was *not* required to prove that element. J.A. 104. As the government conceded below, the trial court "explicitly withdrew from the jury's consideration the issue of appellant's knowledge that the 'firearm' he possessed fell within the statutory definition." U.S. C.A. Br. 10. The Eleventh Circuit also acknowledged that none of the jury's findings, alone or in combination, logically required the jury to find that petitioner knowingly possessed a "firearm," and thus "the district court's

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[11] Like the court of appeals below, other courts of appeals consistently have applied *Staples* to silencer possession offenses. See, *e.g.*, *United States* v. *Syverson*, 90 F.3d 227 (7th Cir.), cert. denied, 117 S. Ct. 435 (1996); *United States* v. *Thompson*, 82 F.3d 849 (9th Cir. 1996).

action effectively omitted from the instructions an essential element of the crime charged under § 5861(d)." Pet. App. 8a. In other words, the omission in this case was a true one — not the sort of curable misdescription encountered in *Pope* or the erroneous presumptions in *Rose* and *Carella*.

As the Court confirmed in *Sullivan*, "a criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime, and absent such a verdict the conviction must be reversed, 'no matter how inescapable the findings to support that verdict might be.'" *California* v. *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring) (quoting *Sullivan*, 508 U.S. at 279). *Sullivan* thus compels the reversal of petitioner's conviction because the jury did not find him guilty of every element of the crimes with which he was charged.

II. THE COURT OF APPEALS WRONGLY HELD THAT OMISSION OF AN ESSENTIAL ELEMENT IS SUBJECT TO HARMLESS-ERROR REVIEW WHERE THE DEFENDANT "ADMITS" THE OMITTED ELEMENT.

Although the Eleventh Circuit concluded that the trial court committed an "error of constitutional dimension" when it removed an essential element from the jury's consideration (Pet. App. 10a), the court nonetheless held that the error was harmless because it "related to an element of the crime that the defendant in any case admitted," and also because the court was "certain that the verdict in this case would have been the same absent the defective instruction." *Id.* at 16a, 17a. This holding cannot be squared with the Court's harmless-error decisions. As this Court explicitly stated in *Rose*, "our harmless-error cases do not turn on whether the defendant conceded the factual issue on which the error bore." 478 U.S. at 583. Indeed, a defendant's right to a jury verdict on every element is constitutionally assured regardless of whether he or she "admits" one or more of those elements.

A. Under the Constitution, a defendant who "admits" an element remains entitled to jury findings on every element of the offense charged *unless* he knowingly and intelligently waives either his right to a *trial* (through a guilty plea properly entered pursuant to Fed. R. Crim. P. 11) or his right to a *jury* (with the government's consent pursuant to Fed. R. Crim. P. 23). See *Henderson* v. *Morgan*, 426 U.S. 637, 647-648 (1976) (White, J., concurring).

A guilty plea, of course, is the least complicated means of establishing a defendant's guilt, since it represents "an admission of all the elements of a formal criminal charge." *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). Yet, because a guilty plea "dispense[s] with [the] Constitutional right to a jury trial," the Constitution and the Federal Rules of Criminal Procedure impose stringent prerequisites to the entry and acceptance of such a plea. *Singer* v. *United States*, 380 U.S. 24, 34 (1965). Among other things, a guilty plea must be taken with the express mutual consent of the defendant and the Government, and must also be "approved by the responsible judgment of the trial court." *Ibid.* By contrast, an accused who (like petitioner) wishes to contest the charges against him need only enter a general plea of not guilty. "In the federal courts, '[a] simple plea of not guilty * * * puts the prosecution to its proof as to *all* elements of the crime charged.'" *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991) (quoting *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988)) (emphasis added).[12]

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[12] See also *Roe* v. *United States*, 287 F.2d 435, 440 (5th Cir. 1961) (a "plea of not guilty puts all in issue, even the most patent truths"). As the Seventh Circuit noted almost 90 years ago, "our conclusion is that an accused person has the same right to have 12 laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting. Inasmuch as jurors are rightly trusted, in close and difficult cases, to maintain the peace and dignity of organized society, surely they may be relied on in the plain and simple ones." *Konda* v. *United States*, 166 F. 91, 93 (1908).

After pleading not guilty, even a defendant who breaks down and openly admits his or her guilt on the stand is "justified * * * in defending solely in reliance on the presumption of his innocence and the State's burden of proof." *Connecticut* v. *Johnson*, 460 U.S. at 87 n.16 (plurality opinion).

In sharp contrast to a guilty plea, a defendant's testimonial admissions concerning one or more elements of the charged offense in no way diminish the government's burden to prove each element beyond a reasonable doubt, or the jury's obligation to determine whether that burden has been satisfied as to each element. In *Estelle*, 502 U.S. at 69, the Court unanimously held that "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." And, as Justice O'Connor also recently explained, "[a]t trial, a defendant may * * * choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element." *Old Chief* v. *United States*, 117 S. Ct. 644, 659 (1997) (dissenting opinion). Even the United States advocated this point in *Old Chief*. See Brief for the United States, *Old Chief* v. *United States* (No. 95-6556), at 22.[13]

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[13] The government did not contend below that petitioner entered a "partial" Rule 11 plea to the *mens rea* element of the crimes charged. Even if it had, as Justice O'Connor observed in *Old Chief*, this Court has never endorsed the concept of a "partial plea of guilty." 117 S. Ct. at 660 (dissenting opinion). See also E. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal*

That a defendant may make a testimonial admission concerning a fact relevant to a particular element of the crime does not mean that the trial court can constitutionally remove that element from the jury's consideration, or that the removal of that element may be declared harmless. Indeed, even if a defendant were to formally *stipulate* to an element — which petitioner clearly did not do — that element *still* would have to be submitted to the jury, since the government still would have the burden of proving that element beyond a reasonable doubt, and because the jury still would have the power to accept or reject that stipulation.[14] A stipulation merely "waives the requirement that the government produce evidence (other than the stipulation itself) to establish the facts stipulated to beyond a reasonable doubt." *United States* v. *Muse*, 83 F.3d 672, 678

Protection, 40 EMORY L.J. 341, 355 (1991) (under the Federal Rules, "the accused does not have the option of specifically admitting some elements of the offense while denying others"; he must "'confess all or deny all'"). The circuits are split on this question. Compare *United States* v. *Breitkreutz*, 8 F.3d 688, 692 (9th Cir. 1993) ("Allowing stipulations to be weighed in the Rule 403 balancing process would thus defeat the rule against partial guilty pleas in most cases"), with *United States* v. *Espinoza*, 641 F.2d 153, 161 (4th Cir. 1981) (recognizing concept of "so-called 'partial guilty plea,'" but also noting that any such plea must be "voluntarily, knowingly and intelligently entered by [the defendant]"); and *United States* v. *Harding*, 491 F.2d 697, 698 (10th Cir. 1974) ("the stipulation to obscenity is in effect a limited plea of guilty and there is no reason why this should not be permissible if it is done freely and voluntarily"). The Court need not resolve this conflict, however; for even assuming that such a plea could be tendered, the strictures of Fed. R. Crim. P. 11 still would need to be satisfied before a court could accept it. In this case, petitioner never pled guilty to any element of the offenses charged.

[14] See, *e.g.*, *United States* v. *Breitkreutz*, 8 F.3d 688, 691 (9th Cir. 1993) ("[a] stipulation is not proof"); *United States* v. *Muse*, 83 F.3d 672, 679 (4th Cir.), cert. denied, 117 S. Ct. 261 (1996) (a stipulation does not "entitle the prosecution to a directed verdict or exact the ultimate price from a defendant: a 'guilty plea' with respect to an element of the crime").

(4th Cir.), cert. denied, 117 S. Ct. 261 (1996). It also may preclude the admission of evidence concerning the stipulated element under Fed. R. Evid. 403. *Old Chief*, 117 S. Ct. at 653-655. Nonetheless, the jury still must decide whether the stipulated fact has been established beyond a reasonable doubt, and can only be instructed that it "may accept" a stipulated fact as proven. See, *e.g.*, *Muse*, 83 F.3d at 679; 1 E. Devitt *et al.*, *Federal Jury Practice and Instructions* § 12.03 (4th ed. 1992) ("you may accept the stipulation as evidence and regard that fact as proved. You are not required to do so, however, since you are the sole judge of the facts"). A proper instruction, then, "must clearly and unequivocally inform the jury that the government has met its burden of proving [the] element, while preserving the defendant's right to a presumption of innocence." Brief of the United States, *Old Chief* v. *United States* (No. 95-6556), at 25.

B. In this case, petitioner did not knowingly and intelligently concede *any* element of the offenses with which he was charged. Unlike the defendant in *Old Chief*, petitioner did not stipulate to *any* element. To the contrary, he insisted on a jury decision as to every element, including the element that the court of appeals found him to have admitted.

In holding that the trial court's omission of the *mens rea* element from the jury instructions was subject to harmless-error review, the court of appeals relied heavily on certain of petitioner's statements during his post-arrest interview and at trial. By those statements, however, petitioner did nothing more than admit specific facts that were introduced into evidence at trial. During his post-arrest interview (conducted at 3:00 a.m., three hours after petitioner's arrest, and again at trial, petitioner testified that he could identify a hidden item found in his truck as a silencer based upon his training with the Special Forces during the Vietnam War. J.A. 30, 65, 69-70. All the while, petitioner emphatically insisted that he would

never knowingly possess a silencer, and that he had never seen the particular silencer in question. J.A. 32-34, 46, 64-65, 93-95.

Such testimonial admissions by a defendant, whatever their nature, are simply pieces of evidence whose weight is to be determined solely by the jury. Petitioner's testimonial "admissions" were entitled to the same solemn consideration by the jury (and not an appellate court) as any other evidence in the record. Thus, the fact that admissions were made concerning a particular element did not render the omission of that element subject to harmless-error review. As the United States openly acknowledged during the oral argument in *Old Chief*, "[w]e cannot get a directed verdict no matter how overwhelming the evidence, and it is open to the defendant to invite doubt as to any piece of evidence, even his own admission." Tr. of Oral Arg., No. 95-6556 (1997 WL 605007), at *50.

By his testimony, petitioner did just what the United States in *Old Chief* acknowledged he could: "invit[ing] doubt" as to evidence bearing on the element of *mens rea*. Petitioner defended against the government's charges by denying that he ever knowingly possessed the silencer in question, and by insisting that he would never knowingly have anything to do with such an item. J.A. 32, 46, 65. Consistent with this defense, petitioner's counsel twice requested that the jury be instructed that petitioner could be found guilty of the offenses charged only if the government proved beyond a reasonable doubt that "the defendant knew th[e] items in question were firearms" under the law. J.A. 12, 83-84. Without that instruction, petitioner's counsel feared that the jury could mistakenly believe that possession of a statutory "firearm" was essentially a strict liability offense. J.A. 54. The district court, ruling without the benefit of *Staples*, refused the requested instruction and charged the jury that the government was *not*

required to prove the petitioner's awareness of the characteristics of the items that made them registerable "firearms" under the law. J.A. 104. The trial court thus deprived petitioner of his constitutional right to have the jury decide whether the evidence adduced at trial by the Government — including his own testimonial admissions — established all of the elements of the offenses charged beyond a reasonable doubt. See *Gaudin*, 115 S. Ct. at 2320.

Because petitioner never entered a guilty plea or waived his right to a jury trial, "the best that can be said for the judgment of conviction entered against the defendant is that it rests on strong evidence never presented to a trier of fact." *Henderson*, 426 U.S. at 650 (White, J., concurring). Juries have the power to conclude that even "strong evidence" does not meet the constitutionally required "beyond a reasonable doubt" standard. This, too, the United States acknowledged in *Old Chief*. See 1997 WL 605007, at *52 ("no matter how overwhelming the evidence, we can always be nonsuited by a jury that has any doubt on any reason, even an irrational one"). Thus, even where the evidence appears entirely one-sided, the jury still has "the power to bring in a verdict in the teeth of both law and facts." *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.).

C. The court of appeals nevertheless justified its invocation of harmless-error review by citing to Justice Scalia's statement in his *Carella* concurrence that an instruction erroneously establishing a conclusive presumption can be harmless if it relates to an "element of the crime that the defendant in any case admitted." 491 U.S. at 270 (Scalia, J., concurring) (citing *Connecticut* v. *Johnson*, 460 U.S. at 87). The court of appeals' reliance on *Carella* is clearly misplaced, transforming an opinion that resoundingly rejects appellate fact-finding into one that would embrace it. *Carella* involved an incorrect instructional *presumption* — not a missing element. The *Carella*

jury, notwithstanding the error, was at least instructed on each of the required elements of the charged offense. In his concurring opinion, Justice Scalia observed that this Court's plurality opinion in *Connecticut* v. *Johnson*

> determined — I think correctly — that the use of conclusive presumptions could be harmless error only in those "rare situations" when "the reviewing court can be confident that [such an] error did not play any role in the jury's verdict." * * * The opinion mentioned as among those "rare situations" an instruction establishing a conclusive presumption on a charge of which the defendant was acquitted (and not affecting other charges), *and an instruction establishing a conclusive presumption with regard to an element of the crime that the defendant in any case admitted.*

491 U.S. at 270 (emphasis added).

The reasons why a defendant's admission could be significant in a defective presumption case are absent when an element has been wholly omitted. In a case like *Carella*, an unequivocal in-court admission may render a defective presumption harmless only because it is reasonable to believe that such compelling evidence going directly to the "ultimate fact" rendered the presumption superfluous. In that instance, then, a reviewing court could conclude that the jury in fact made the requisite findings concerning the element in question because it was instructed generally as to the necessity of finding that element. An admission in such circumstances renders an instructional error harmless *not* because the admission can substitute for a missing jury finding, but because it "sufficiently reduc[es] the likelihood that the jury applied the erroneous instruction" at all. *Johnson*, 460 U.S. at 87. See also *id.* at 94 (Powell, J., dissenting) ("where intent to kill is conceded — as

where self-defense is pled — there would be no occasion to give a *Sandstrom* instruction").

It is quite another thing for a reviewing court to hold that the complete *omission* of an essential element can be declared harmless because the defendant, by his testimony, effectively admitted that element. The difference is that in the case of an omission, it is the reviewing court — and *not* the jury — that assesses the evidentiary weight of the defendant's admission. Indeed, for an appellate court to declare that the omission of an element was harmless because the defendant "admitted" that element would be no different than holding that the omission may be harmless because the evidence on that element was "overwhelming" — a result squarely forbidden by *Sullivan*. As Justice Scalia explained:

> A defendant may assuredly insist upon observance of [the jury trial] guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State. That is also why in [*Carpenters*] the Court did not treat as harmless a jury instruction that mistakenly did not require express authorization or ratification to hold a union criminally liable for its officers' participation in an antitrust conspiracy — regardless of how overwhelming the evidence that authorization or ratification in fact existed.

Carella, 491 U.S. at 268-69 (Scalia, J., concurring) (citations omitted). In short, because the trial court below completely omitted the essential element of *mens rea* from the jury's consideration, the fact that petitioner made testimonial admissions relevant to that element is constitutionally irrelevant

for purposes of determining whether the court's constitutional error is subject to harmless-error scrutiny.

III. FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT REQUIRES REVERSAL IF THE RIGHT TO TRIAL BY JURY IS TO BE PRESERVED.

A. The court of appeals believed it was entitled to "fill in the gaps" left open by a trial court's instructional errors based on its "certain[ty]" that the jury's verdict "would have been the same absent the defective instruction." Pet. App. 17a. If upheld, such unprecedented use of the harmless-error doctrine would substantially and inexorably erode the Constitution's explicit jury trial guarantees. For this reason, it is imperative that the right to have "a jury determine, beyond a reasonable doubt, [a person's] guilt of every element of the crime with which he is charged" (*Gaudin*, 115 S. Ct. at 2320) be rigidly enforced without exception — regardless of whether the trial court omits one, two or more of the elements of the offense charged.

Sullivan is the touchstone here because of its explicit rejection of "earlier cases embracing the idea that the harmlessness of an error may be gauged simply through an appellate court's own assessment of guilt." H.T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1201 (1996). Yet, notwithstanding *Sullivan's* unambiguous command, appellate courts have continued to use harmless-error review as a means of affirming the convictions of those persons whom the reviewing courts believe to be guilty. As Chief Judge Edwards explained, "the seductiveness of this approach is its chief defect, for, drawn in by its attractions, we have applied the harmless-error rule to such an extent that it is my impression that my colleagues and I are inclined to invoke it almost

automatically where the proof of a defendant's guilt seems strong." *Id.* at 1170.

This Court observed in *Duncan* v. *Louisiana* that the right to trial by jury embodies "a profound judgment about the way in which law should be enforced and justice administered," with the jury serving as a structural safeguard "to prevent oppression by the Government" and to ensure "community participation in the determination of guilt or innocence." 391 U.S. at 155, 156. The Court also acknowledged the "impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court." *Id.* at 153-54. Indeed, the right to a jury determination of guilt or innocence has long been regarded an essential safeguard against "the tyranny of popular magistrates in a popular government" (A. Hamilton, Federalist No. 83 (C. Rossiter ed. 1961)), and "'a sacred part of our legal privileges.'" *Gaudin*, 115 S. Ct. at 2315 (quoting 1 S. Smith & T. Lloyd, *Trial of Samuel Chase* 34 (1805)).[13]

As first-hand observers of the trial process itself, jurors are uniquely suited to make the countless credibility and other factual determinations that are crucial to a fair and reliable assessment of guilt or innocence. Appellate judges, by contrast, necessarily are limited to a "dead" record, and thus are ill-equipped to resolve factual controversies or to make credibility

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[13] See also G. Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1366 (1994) ("The defendant's Sixth Amendment right to a jury verdict dictates adoption of the harmless-error test that best limits appellate-level intrusion on the jury's factfinding role. It is worth remembering that if a court finds an error harmful, the remedy is a new trial, not a permanent release. Reversal for harmful error means only that the defendant will have a second chance at a fair result by a fair process").

determinations. As Justice Stevens put it, trial "testimony and accompanying exhibits are much more difficult to assimilate and fully comprehend from the cold record than in the living trial, and of course we do not have the opportunity to make assessments of the demeanor of the witnesses." *Colorado* v. *New Mexico*, 467 U.S. 310, 326 (1984) (dissenting opinion). See also *Caldwell* v. *Mississippi*, 472 U.S. 320, 330 (1985) ("an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record"); *United States* v. *Bayer*, 331 U.S. 532, 536-537 (1947) ("[h]ow far any charge on technical questions of law is really understood by those of lay background would be difficult to ascertain, but it is certainly more evident in the living scene than in a cold record").[16]

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[16] See also Edwards, *supra*, 70 N.Y.U. L. REV. at 1193-1194 ("The very nature of the appellate function leaves judges of the courts of appeals poorly equipped to make * * * guilt determinations. An appellate judge's view of the trial is limited to the record, and, as any observer of the judicial process is aware, many events of trial pass without casting so much as a shadow upon the printed transcript. The appellate judge cannot watch the demeanor of witnesses, listen to the intonations of their voices, or engage in any of the countless other observations that inhere in an assessment of credibility"); G. Mitchell, *supra*, 82 CAL. L. REV. at 1340, 1353 ("appellate-level factfinding is undesirable for two reasons. First, it places the appellate court in the position of trier of fact, a role traditionally reserved for the jury. This undermines the jury's function as the conscience of the community and intrudes on the Sixth Amendment right to trial by jury. Second, it allows appellate judges, who are poorly situated to make any factual determination, to decide the ultimate fact: whether the defendant is guilty or not guilty. * * * Review of an antiseptic record removes appellate judges from the emotion and intensity that may be crucial to understanding and weighing of testimony. It is impossible to capture in a transcript all of the characteristics of a witness that go to her credibility").

To preserve the sanctity of the jury as the exclusive finder of fact, the line establishing the respective domains of the judge and jury in the process of adjudicating guilt must be rigidly observed without regard to the perceived weight of the evidence. Indeed, if appellate courts are given any latitude at all to review the record to "fill the gaps" in a jury verdict, as "minor" as those gaps may seem, there will be no principled means of preventing the complete erosion of the right to trial by jury.

In this case, the court of appeals took comfort in the fact that its intrusion into the realm of the jury involved *only* one element of the offenses charged, and that the jury had otherwise "made a constitutionally valid determination of guilt on all issues save one." Pet. App. 13a n.12. Yet, if it is permissible for a reviewing court to overlook the omission of one element, why not two, or even three? What principled difference could there possibly be? There is, of course, none at all. Blackstone warned long ago that any "inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, *though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.*" 4 W. Blackstone, *Commentaries on the Laws of England* 344 (1769) (emphasis added). Blackstone's admonition illustrates the fatal flaw in the Eleventh Circuit's decision, and poignantly demonstrates that the right to trial by jury is itself at stake where, as here, an appellate court purports to make a seemingly "minor" incursion into the constitutional domain of the jury. Despite the seemingly seductive logic of declaring harmless the removal of an essential element from the jury so long as an appellate court is "convinced" that the defendant admitted it — and so long as only one element is involved — the magnitude of the constitutional violation is the same, since the inescapable fact will remain that the "wrong entity" has judged the defendant guilty.

B. The facts of this case also demonstrate the folly of allowing reviewing courts to declare harmless the omission of elements that the jury never considered. For even where a defendant has made testimonial admissions concerning those elements, there is no reliable way of determining what the jury would have decided had it been instructed to consider the omitted element. For instance, the trial judge here explicitly stated that this was a "difficult" case in which the "jury had trouble with their deliberations" (J.A. 109), and in which petitioner's defense focused exclusively on the elements of knowledge and *mens rea, i.e.*, that he did not, and never would have, knowingly possessed a silencer because of his experiences with such items during the Vietnam War.

"It is well established that [a challenged] instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973)). In this particular instance, and as this Court's decision in *Staples* v. *United States*, 511 U.S. 600 (1994), reflects, the element omitted by the trial court was a critical one that could have proven decisive in the jury's deliberations. By telling the jury that the government was not required to prove that the defendant knowingly possessed a firearm within the meaning of the law, the jury easily could have believed that possession of an unregistered or unserialized silencer was a strict liability offense. Indeed, that is precisely why this Court held that *mens rea* (or as this Court described it, a "guilty mind") was required to establish a "firearms" possession offense under 18 U.S.C. § 5861(d). 511 U.S. at 607 n.3.

The trial court below observed that this was "a difficult decision for" the jury and that there were "a number of jurors in there, frankly, wiping away tears." J.A. 109. As the trial court simply put it, "the jury had trouble with their deliberations." *Ibid.* Given that petitioner's defense centered

around his knowledge and state of mind and his unequivocal denial of guilty knowledge, and because the government's case on knowledge was entirely circumstantial, it is not at all unlikely that a sympathetic jury "trouble[d] with [its] deliberations" might have acquitted petitioner if instructed that it could only convict him if it found beyond a reasonable doubt that he had a "guilty mind" and intended to commit a wrongful act.

In the end, however, whether the giving of a *Staples* instruction would have made a difference is a question that no reviewing court can ask, let alone answer, under the Constitution. Indeed, regardless of any admissions that petitioner may have made, the undeniable fact remains that there was no verdict here "upon which harmless-error scrutiny can operate." *Sullivan*, 508 U.S. at 280. Thus, to affirm such a conviction under the harmless-error doctrine would mean that "the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578.

Since *Chapman* v. *California*, this Court has emphasized its commitment to the principle that it can never be harmless for a person to stand convicted of a crime when the jury has not found every element of the offense charged beyond a reasonable doubt. The Court should now confirm that that is indeed where the constitutional line has been drawn, and hold that the court of appeals crossed it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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